
***IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT***

OGLALA SIOUX TRIBE,

Petitioner

v.

**UNITED STATES NUCLEAR
REGULATORY COMMISSION
AND THE UNITED STATES OF
AMERICA**

Respondents

**RESPONSE TO FEDERAL
RESPONDENT'S MOTION
TO DISMISS**

CASE FILE NO. 17-1059

**POWERTECH (USA), INC.'S RESPONSE IN SUPPORT OF FEDERAL
RESPONDENT'S MOTION TO DISMISS**

On March 17, 2017, Federal Respondent, the United States Nuclear Regulatory Commission (hereinafter the "Respondent"), submitted a Motion to Dismiss the Notice of Appeal filed by Petitioner, the Oglala Sioux Tribe (hereinafter the "Petitioner"), based on several factors including, but not limited to, the fact that the agency had not yet issued a "final" decision on Contentions 1A

and 1B below and, thus, no “final” decision on the *entire* proceeding. These factors are primarily based on the fact that there continue to be ongoing discussions and negotiations to cure the deficiencies identified by the NRC’s Atomic Safety and Licensing Board and sustained by the Commission on appeal. Powertech (USA), Inc. (“Powertech”), hereby submits this Response in Support of Respondent’s Motion and fully supports all arguments offered by Respondent with the following additions.

First, Powertech concurs with the legal precedent cited by Respondent¹ and notes that it has been an active participant in the ongoing discussions between Petitioner and Respondent to attempt to cure the deficiencies noted by the ASLB and the Commission. An extended timeline for resolution of these issues is not envisioned, as Powertech has offered parameters for a site survey to cure the deficiencies noted by the ASLB and the Commission that were previously accepted

¹ This Court considered these same issues in 1999 when an appeal of partial initial decisions was submitted and where NRC specifically stated that the licensing proceeding was still ongoing. In that case, this Court dismissed the case and even issued an Order to Show Cause to that Petitioner asking for reasons “why the court should not assess sanctions for filing a clearly premature petition for review, in the amount of the costs and fees incurred by respondent in filing the motion to dismiss.” *Compare Eastern Navajo Dine Against Uranium Mining and Southwest Research and Information Center v. USNRC*, No. 99-1190, 1999 U.S. App. LEXIS 25177 (D.C. Cir. 1999), *quoting Commonwealth of Mass. V. NRC*, 924 F.2d 311, 322 (D.C. Cir. 1991). Given that Powertech, as a potential intervening party, would be remiss if it did not file a response to Respondent’s Motion to Dismiss, the potential for sanctions should apply to costs and fees incurred by Powertech if this Court sees fit to issue an Order to Show Cause.

by Petitioner and utilized by other consulted Native American Tribes. Given that these discussions are ongoing, it would not be prudent for this Court to hear this appeal at this time when a resolution to this matter will be achieved and Petitioner may appeal other issues decided adversely to them.

Second, Powertech would like to emphasize that Respondent's argument regarding the issuance of a "final" decision and the interest of judicial economy carry with them an additional argument of significant interest. Powertech submitted a license application to NRC for its consideration in 2009 and also applied for additional permits and approvals with the United States Environmental Protection Agency (EPA) and the State of South Dakota as required by applicable law. The reviews of these permits and approvals are still ongoing and may be further delayed due to the ongoing nature of the proceedings associated with Powertech's NRC license. Indeed, all that has occurred in terms of permit or approval issuance over the course of the ongoing administrative litigation since April of 2014 has been issuance of a draft underground injection control (UIC) permit by EPA. By allowing the instant appeal to move forward, this Court would be unnecessarily expending judicial resources to litigate an issue that may, as NRC has noted, be cured with the ASLB and present much different legal issues should Petitioner seek judicial review of such cure with the Commission and, potentially later, this Court. This would force both Respondent and Powertech to expend

valuable financial resources to unnecessarily litigate the current appeal and then have to return later to re-litigate essentially the same issues. It also would add additional time to this proceeding which will unnecessarily extend the timeframe within which Powertech can obtain its additional permits and approvals and move toward project development.

Third, Powertech would like to address a puzzling claim made by Petitioner in its recent March 24, 2017, Response to Powertech's Motion for Leave to Intervene filed on March 17, 2017. Petitioner alleges that Powertech's Motion concedes that this Court has jurisdiction over their appeal under the Hobbs Act and, therefore, contradicts Respondent's Motion to Dismiss. This is a misinterpretation of Powertech's statement. When making its statement in its Motion, Powertech's intent was to indicate to this Court that it believed it had jurisdiction over Petitioner's notice of appeal as an appeal from NRC on an order from the Commission, which is standard law for such appeals. Its statement was in no way related to the possibility that this Court may lack jurisdiction based on the potential issues to be presented on appeal. Indeed, at the time of the filing of its motion, Powertech had no specific knowledge of the issues that would be raised on appeal as this Court's deadline for filing a docketing statement and/or a statement of the issues to be presented on appeal. Only on March 24, 2017, did Petitioner provide such issues on appeal, one of which deals expressly with Contentions 1A

and 1B below. Therefore, Petitioner's claim that Powertech has conceded jurisdiction on its appeal based on its statement in its Motion for Leave to Intervene is misguided.

Therefore, for the foregoing reasons and based on arguments presented by Respondent, Powertech fully supports Respondent's Motion to Dismiss and respectfully requests that this Court dismiss Petitioner's appeal for lack of jurisdiction.

Dated this 27th day of March, 2017.

Respectfully Submitted,

By: 

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CERTIFICATE OF SERVICE

I, Christopher S. Pugsley, hereby certify that I caused a true and correct copy of Powertech (USA), Inc.'s Response in Support of Federal Respondent's Motion to Dismiss to be served by United States Mail on the following this 27th day of March, 2017:

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